IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.901 OF 2002
IN
NOTICE OF MOTION NO.2092 OF 2002
IN
SUIT NO.2584 OF 2002

ICICI Bank Limited, (Debenture Trustees), a company incorporated under the Companies Act, 1956 and licensed as a Bank under the Banking Regulation Act, 1949 and having its Registered Office at Landmark, Race Course Circle, Vadodara-390 007 and having its Corporate Office at ICICI Bank Towers, Bandra Kurla Complex, Bandra (East), Mumbai-400050 with whom ICICI Limited was amalgamated pursuant to the orders passed by this Hon'ble Court. .. Appellants
(Orig.Plaintiffs)

v/s.

1. Apple Finance Limited,
   11/13, Botawala Building, Floor 1,
   Opp. Horniman Circle, Fort,
   Mumbai- 400 023.

2. Canara Bank,
   Maker Towers, Circle Office, 13th and 14th
   Floors, “E” Wing, Cuffe Parade,
   Mumbai – 400 005.

3. Union Bank of India
   16, 3rd Floor, Old Court, House Street,
   Calcutta -700 001. .. Respondents
   (Orig.Defendants)

Mr. Birendra Saraf with Mr. S.T. Tilokchandani and Mr. Durgesh Khanapurkar i/by M/s. M.K. Ambalal & Co. for the appellants.

Mr. D.D. Madon, senior counsel with Mr. C.D. Patel i/by M/s. Kanga & Co. for the respondent No.1.

Mr. S.A. Bhalwal i/by M/s. Vyas and Bhalwal for the respondent No.3.

CORAM : R.M.LODHA &
S.A.BOBDE, JJ.

DATED : 9TH NOVEMBER, 2006.

ORAL JUDGMENT (Per R.M. Lodha, J.)

The plaintiffs are in appeal against the order dated August 8, 2002, passed by the learned motion Judge. The challenge to the impugned order is on two counts. The first ground is that the learned motion Judge was not justified in not appointing Receiver in respect of the property mentioned in Exhibit `A3' as according to the original plaintiffs, the defendant No.1 agreed to create mortgage in respect of the said property. The other ground is the non-consideration and non-grant of prayer (g) of the notice of motion viz. the direction to the first defendant to deposit a sum of Rs.50,00,00,000/- allegedly lying to the credit of Debenture Redemption Reserve in this court or with the plaintiffs.

2. The plaintiffs are the debenture trustees. They filed the suit for the amounts payable by the first defendant in respect of the debentures as set out in the plaint. A sum of Rs.6,00,00,000/- is said to be due and payable to the plaintiffs by the first defendant being the

principal outstanding amount in respect of the series I debentures privately placed with the Unit Trust of India together with interest and other charges at the contractual rate due thereon till the date of payment and/or realisation. The other sum of Rs.47,00,00,000/-, according to the plaintiffs, is also due and payable by the defendant No.1 being the principal outstanding amount in respect of series II debentures privately placed with the Nainital Bank Ltd., United Bank of India, UTI India Debt Fund, Central Bank of India, Peerless General Finance & Investment Co.Ltd., Bank of Baroda, Dena Bank and Bank of Madura, together with interest at the contractual rate and other charges due thereon till the date of payment and/or realisation. The case of the plaintiff is that debentures were due for payment on 15.10.2002 but the first defendant failed to redeem the debentures by making payment thereof. The plaintiffs took out the notice of motion, interalia, for the appointment of Receiver of all the immovable properties of the first defendant particularly described in Exhibits `A1', `A2', `A3' and `A4' and the moveable properties and receivables described in Exhibits `B1' and `B2'. The plaintiffs also prayed for the restraint order against the defendant No.1 from disposing of, selling, transferring, alienating or encumbering the properties described in Exhibits `A1', `A2', `A3' and `A4' and the moveables and the receivables described in Exhibits `B1' and `B2'. The plaintiffs further prayed for the direction to the first defendant to deposit a sum of Rs.50,00,00,000/- allegedly lying to the credit of Debenture Redemption Reserve in this court or with the plaintiffs.

3. It appears that at the ad-interim stage, in the absence of

any reply, the learned motion Judge disposed of the notice of motion after hearing the counsel for the parties. The defendant No.1 agreed for sale of the immovable properties described in Exhibits `A1' and `A2'. As regards the property described in Exhibit`A3', the first defendant submitted that there was no agreement to create charge in respect of the said property in favour of the plaintiffs. With regard to the direction to the first defendant to deposit a sum of Rs.50,00,00,000/-, the first defendant submitted before the learned motion Judge that a sum of Rs.50,00,00,000/- was only book entry and that the said assets are not available as the net work of the company has disappeared.

4. In the light of the submissions of the learned counsel for the parties, the learned motion Judge appointed the Court Receiver in respect of the properties described in Exhibits `A1' and `A2'; directed the Receiver to take possession of the suit properties without power to sell and permitted the plaintiffs to proceed with the sale of the said properties on valuation thereof. The learned motion Judge also appointed Court Receiver in respect of the book debts described in Exhibit `B2' Part (b) and Part (c). With regard to the properties described in Exhibit `A4', the learned motion Judge restrained the defendants from transferring, alienating or creating third party rights in respect of the said property.

5. However, with regard to the property described in Exhibit `A3', no interim relief was granted to the plaintiffs since they failed to show that any charge has been created by the first defendant in

respect thereof in favour of the plaintiffs. Since the said property was found to be mortgaged with the defendant No.2 (in the order wrongly mentioned as defendant No.3), it was observed that the defendant No.2 may sell the said property and recover their dues and if there is any excess amount in balance, the same shall be deposited in the court.

6. The counsel for the appellants (plaintiffs) fairly conceded that there was no written document evidencing the creation of charge of the properties mentioned in Exhibit `A3' in favour of the plaintiffs. He, however, submitted that the first defendant orally agreed to create the charge of the property described in Exhibit `A3' in favour of the plaintiffs. He referred to Exhibits `G' and `H' in support of the plaintiffs' case that by an oral agreement, the charge in respect of the properties described in Exhibit `A3' was created in favour of the plaintiffs.

7. We considered Exhibits `G' and `H'. Exhibit `G' is the letter written by the first defendant to the plaintiffs on 1st March, 2001 intimating them about the proposed joint meeting to be held on 9th March, 2001. The main agenda of the said meeting was concerning issuance of NOC by the Canara Bank Debenture Trustees/ holders of the AAA-III series of debentures for creation of pari passu charge with regard to the commercial complex at Bandra-Kurla in favour of all the other creditors of the company. The commercial complex at Bandra-Kurla is the property mentioned in Exhibit A3 is not in dispute. Exhibit `H' is another letter sent by the first defendant to the plaintiffs again

with regard to the meeting scheduled to be held on March 9, 2001 for the same subject.

8. We are afraid, from the aforenoticed two letters, no inference can be drawn that the first defendant agreed to create charge of the property described in Exhibit `A3' in favour of the plaintiffs. Both these letters relate to the joint meeting to be held on 9th March, 2001 to discuss about the creation of pari passu charge with regard to the property described in `A3'. Except the bald statement made in the plaint that in the said meeting held on 9th March, 2001, the defendant No.1 agreed to create the pari passu charge in respect of the property described in `A3', there is nothing on record to believe the case of the plaintiffs. In this view of the matter, we do not find any fault in the order of the learned motion Judge refusing to appoint the Court Receiver in respect of the property described in Exhibit `A3'.

9. The other grievance, as we have indicated above, of the appellants is that the learned motion Judge did not consider the plaintiffs' prayer for direction to the first defendant to deposit a sum of Rs.50,00,00,000/- allegedly lying to the credit of the Debenture Redemption Reserve.

10. We carefully examined the Debenture Trust Deed dated 24th September, 1997. Clause 6 thereof provides for the events of defaults and remedies. Interalia, it provides thus-

6. EVENTS OF DEFAULT AND REMEDIES

(A) If one or more of the events specified below (hereinafter called 1the Event(s) of Default') happen(s), the Trustees, ma, in their discretion, and shall, upon request in writing of the holders of the Debentures of an amount representing not less than three-fourth in value of the nominal amount of the Debentures for the time being outstanding or by a Special Resolution duly passed at the meeting of the Debentureholders convened in accordance with the provisions set out in the Fifty Schedule hereunder written, by a notice in writing to the Company declare the principal amount of the Debentures, all interest and all other monies to be due and payable forthwith and the security created hereunder shall become enforceable:-

i) Default is committed in payment of the principal amount of the Debentures on the due date(s);

ii) Default is committed in the payment of any interest on the Debentures on the due date(s);

iii) Default is committed in the performance of the obligations under the contracts/agreements;

iv) Default is committed in the performance or observance of any covenant, condition or provision contained in these presents and/or the Financial Covenants and Conditions (other than the obligation to pay principal and interest) and, except where the Trustees certify that such default is in their opinion incapable of remedy (in which case no notice shall be

required) such default continues for thirty days after written notice has been given thereof by the Trustees to the Company requiring the same to be remedied;

v) Any indebtedness of the Company for borrowed monies i.e. Indebtedness for and in respect of monies borrowed or raised (whether or not for cash consideration) by whatever means (including acceptance, credits, deposits and leasing) becomes due prior to its stated maturity by reason of default of the terms thereof or any such indebtedness is not paid at its stated maturity;

.....

11. Clause 31C of the Debenture Trust Deed provides for Debenture Redemption Reserve that reads thus-

"C. DEBENTURE REDEMPTION RESERVE

The Company shall out of its divisible profits as hereinafter defined set annually commencing from the financial year ending on December 31,1998 a sum not less than Rs.1,50,00,000 (Rupees One Crore Fifty Lacs Only) till the financial year ending on December 31,1999 and shall transfer to and credit such sums to a reserve to be called "Debenture Redemption Reserve".

Provided that the Company may in any year transfer to and credit Debenture Redemption

Reserve with a sum in excess of the foregoing annual contribution and such excess may be applied by the Company in reduction pro tanto of its aforesaid contribution for the subsequent year or years.

Provided Further that if in any financial year of the Company on account of inadequacy or absence of profit the Company has not set apart fully the said sum of Rs.1,50,00,00,000 and has not transferred and credited to the Debenture Redemption Reserve, then the Company shall, out of the divisible profits of the subsequent year or years immediately thereafter make good the shortfall or deficit by appropriate additional transfer and credit to the Debenture Redemption Reserve to the aforesaid extent before such divisible profits of the relevant year or years are utilised by the Company for any other purpose.

a) The expression “divisible profits” shall, unless otherwise agreed to be the Company and the Trustees, mean the profits of the Company in respect of the Company's financial year after providing for normal depreciation on the Company's assets and also after providing for all taxes and duties on income or revenue payable by the Company but before setting aside any sum to free reserves.

b) The amount standing to the credit of the Debenture Redemption Reserve may be used in the redemption of the Debentures after 10% of the Debentures have been redeemed.

c) All Debentures redeemed out of the Debenture Redemption Reserve shall be

cancelled and the Company shall not be entitled to keep the same alive for the purpose of reissue.

d) The Company shall procure and submit to the Trustees a certificate from the Auditors at the end of each financial year certifying that the Company has transferred the aforesaid sum of Rs.1,50,00,00,000 to the Debenture Redemption Reserve.

e) The Company hereby agrees and undertakes that, if during the currency of these presents, any new guidelines are formulated (or modified or revised) by the Government or any other authority in respect of creation of Debenture Redemption Reserve the Company shall abide by such guidelines and execute all such supplemental letters, agreements and deeds of modification as may be required by the Trustees and shall also cause the same to be registered, where necessary."

12. It would be, thus, seen that as per the Debenture Trust Deed, the first defendant was obligated to create a reserved fund called Debenture Redemption Reserve of a sum of Rs.1,50,00,000/- commencing from the financial year ending on December 31, 1998 till the financial year ending December 31, 1999 out of its divisible profit, as defined therein. According to the plaintiffs, the first defendant committed default in payment of the amount of the debentures on the due date(s) and also the default was committed in the performance of the obligations provided in the Debenture Trust Deed and it was for this reason that they have filed the suit. Though, the plaintiffs have

averred that the first defendant had credited Rs.50,00,00,000/- to the redemption reserve, the submission of the first defendant is that it was only a book entry. Nothing has been shown by the plaintiffs as to what was the divisible profit as defined in the agreement of the first defendant company from the financial year ending from December 31, 1998. As per clause 31C, the company was obligated to create the reserve to be called as Debenture Redemption Reserve out of its divisible profits as set out in the agreement. There is no definate pleading to that effect by the plaintiffs. In any case, the plaintiffs have already filed the suit for recovery of the outstanding amount in respect of the concerned debentures and for default of non-fulfillment of the obligations of the trust deed and in this view of the matter, there is no question of asking the first defendant to deposit a sum of Rs.50,00,00,000/- as prayed for by the plaintiffs. As a matter of fact, if such relief is granted, it would tantamount to granting the decree straightway without trial in favour of the plaintiffs in the sum of Rs.50,00,00,000/- which, in our view, cannot be granted.

13. All in all, the appeal is wholly misconceived and is liable to be dismissed and is dismissed with no order as to costs.

(R.M.LODHA, J.)

(S.A.BOBDE, J.)